



Lynda Weber, a pharmacy technician, answered the telephone, entered prescriptions into a computer, filled the prescriptions and filed the medications. She had to hold the telephone against her face by flexing her neck over to her shoulder so her hands would be free while she provided customer service at the drive-through.

Claimant began to experience neck stiffness and pain in December 2004. As the pain persisted and worsened, the claimant sought treatment on December 20, 2004, at the emergency room and was provided an injection of pain medication. As claimant continued working her neck pain worsened. The emergency room doctor advised claimant to not flex her neck to hold the phone at work. Claimant told her boss, Trish Walsh, what the doctor had said and was told she needed a written restriction from the doctor. Claimant alleged this conversation occurred within a week after she went to the emergency room. But claimant did not consider that she had suffered an injury because she thought of an injury as an incident such as a fall, consequently she did not allege a work-related injury. She testified:

Q. You had been to the emergency room in December of 2004; correct?

A. Correct.

Q. At that time you were led to believe or at least you reported to them that you thought maybe the use of the phone at work was causing problems with your neck; correct?

A. Yes.

Q. But then that wasn't reported to your supervisor until February 3, possibly, of 2005; correct?

A. I didn't - - when I went to the emergency room, I didn't realize that my problem was caused from work. I didn't realize what was going on. The doctor actually asked me, did you injure yourself, did you injure yourself? And then he asked me - - and I'm like, no. Because I thought he meant, did you fall, did you, you know, did somebody hit you or did you, you know - - and I'm like, no, I didn't injure myself. And he touched, you know, my neck. And he was like, oh, my God, you know. And he was like, what did you do to yourself? And I'm like, you know, nothing. I just went to work and now I'm here. And he's like, well, you know, what are you doing repeatedly that's doing this to yourself? And, you know, so I'm sitting there thinking and trying to think because, you know, I'm in mystery. And I'm like, well, the only thing I can think of is maybe doing this (indicating) on the phone. And he is like, well, I have seen people that have done that and that can cause for your neck to be stiff and for you to have big muscle spasms and severe pain like that.

Q. So even after that discussion with the emergency room doctor, it was six weeks later before you notified Ms. Walsh; correct?

A. Yes. Because I was thinking like injury like, you know, like that I had fallen or, you know - - <sup>1</sup>

As claimant continued working she began experiencing an increase in neck stiffness due to working the drive-through more. She sought medical treatment with her family physician on January 13 2005, since respondent had not offered any treatment. The doctor noted the claimant was having pain and muscle spasms in her thoracic spine. Claimant was referred for physical therapy. On February 2, 2005, an MRI was performed which revealed a bulge at C4-5 and a small annular tear. The claimant testified she notified Ms. Walsh on February 3rd or February 4, 2005, that she had suffered an injury. On February 9, 2005, claimant reported her problems to the insurance adjuster. Claimant's last day worked was February 14, 2005.

K.S.A. 44-520 provides:

**Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, **except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.** The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice. (Emphasis Added)

The claimant's uncontradicted testimony was that within a week of her emergency room visit she notified her supervisor about the visit and that the doctor had stated she should not use her neck to hold the telephone at work. This clearly apprised her employer that her work duties were causing her such pain that she was seeking medical attention. The employer had actual knowledge. Moreover, as claimant continued working she continued to aggravate her neck condition and upon being told the results of the MRI she finally realized that her condition was caused by work and constituted an accident. There is no dispute that she notified respondent at that time. Claimant provided timely notice.

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<sup>1</sup> P.H. Trans. at 24-26.

The claimant described the captive positioning of her neck in order to hold the phone while performing her job duties. Dr. Truong related her neck condition to her work. The ALJ concluded claimant established she was injured working for respondent and her injury arose out of and in the course of employment. The Board agrees and affirms.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>2</sup>

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 25, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2005.

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BOARD MEMBER

c: Michael Snider, Attorney for Claimant  
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>2</sup> K.S.A. 44-534a(a)(2).